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CS Docket No. 97-80

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MEDIA BUREAU

**VIA HAND DELIVERY**

Federal Communications Commission  
Media Bureau  
P.O. Box 358205  
Pittsburgh, PA 15251-5205

CSR-7192-Z

**Re: Petition for Waiver - CS Docket No. 97-80**

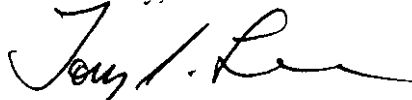
Dear Sir/Madam:

On behalf of Bernard Telephone Company Inc. ("Bernard"), transmitted herewith are an original and four (4) copies of its Petition for Waiver. Specifically, Bernard petitions the FCC for waiver of the set-top box integration ban set forth in of Section 76.1204(a)(1) until December 31, 2009. The required filing fee of \$1,250.00 in the form of a check made payable to the Federal Communications Commission, a Form 159, and an original of this letter are also attached.

Acknowledgement and date of receipt of this filing is requested. A duplicate copy of this filing is provided for this purpose.

Should you have any questions concerning this matter, please contact the undersigned at 202-857-1707.

Sincerely,



**Tony S. Lee**

Counsel for Bernard Telephone Company Inc.

Enclosures

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Before The  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C. 20554

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In the Matter of	)	
	)	
Bernard Teleahone Compañy Inc.	)	
	)	CSR- _____
Petition for Waiver of Section 76.1204(a)(1)	)	
of the Commission's Rules	)	
Implementation of Section 304 of the		CS Docket No. 97-80
Telecommunications Act of 1996	)	
	)	
Commercial Availability of Navigation Devices	)	

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**PETITION FOR WAIVER**

Bernard Telephone Company Inc. ("Petitioner"), by its undersigned attorneys, and pursuant to Sections 1.3 and 76.7 of the Commission's rules,<sup>1</sup> respectfully petitions the FCC for waiver of the set-top box integration ban set forth in Section 76.1204(a)(1) until December 31, 2009.<sup>2</sup> As further discussed below, navigation devices that are compatible with Petitioner's all-digital video distribution network and that comply with the FCC's integration ban are not available, and a waiver is warranted to enable Petitioner to continue to provide and expand its advanced digital video service offerings in the small rural communities that it serves. In support hereof, Petitioner states as follows:

**1. BACKGROUND**

Petitioner is a multichannel video programming distributor ("MVPD") that serves small historically underserved rural communities in Iowa. Petitioner currently provides video service to approximately 1,000 households in the rural areas of Dubuque County, Jackson County and

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<sup>1</sup> 37 C.F.R. §§ 1.3, 76.7.

<sup>2</sup> 47 C.F.R. § 76.1204(a)(1).

Jones County, including the community of Bernard through an all-digital Copper and Fiber video distribution network. Petitioner is one of several small MVPDs in Iowa that obtains video programming through a central distribution network connected to a headend operated by Iowa Network Services, Inc. (“INS”). Due to the all-digital nature of Petitioner’s system, it is necessary for all video service subscribers to use a set-top box in order to access video programming. Subscribers cannot view any channels without using digital set-top boxes because no analog television signals are distributed through Petitioner’s video system. Petitioner’s all-digital network enables it to provide service using bandwidth more efficiently, and to provide additional high-quality and innovative features such as pay per view and broadband Internet services without the overhead and expense of transmitting and maintaining legacy analog television signals.

Petitioner utilizes set-top boxes that incorporate “middleware,” that is, software that allows the set-top boxes and MVPD systems to communicate with each other. Middleware coordinates, among other things, the electronic program guides, pay-per-view services, interactive television capabilities, transmission of data, and conditional access functions of the set-top box. The middleware vendor of Petitioner’s video system utilizes a conditional access system provided by NagraVision. NagraVision supplies the set-top boxes used with its conditional access system. The NagraVision solution uses a point-of-deployment module (“POD”), i.e., a smartcard, with the set-boxes to allow access to Petitioner’s video service. CableCARDS are PODs that are used in the cable television industry to allow customers to gain condition access to video programming using televisions and navigation devices purchased through retail outlets. However, the NagraVision smartcards utilize a proprietary form factor that does not adhere to the standards for CableCARDS promulgated by the Personal Computer

Memory Card International Association. Accordingly, the Nagravision smartcard cannot be used on navigation devices purchased at retail, and the set-top boxes used by Petitioner's subscribers must be supplied or manufactured by Nagravision.

Through INS, Petitioner has contacted its middleware provider in an attempt to confirm that its implementation of the Nagravision conditional access solution complies with the integration ban requirement to fully separate the security element from the basic navigation device.<sup>3</sup> Although some of the middleware providers have acknowledged receipt of INS's inquiry, to date, none of the providers have been willing to confirm that their conditional access implementations comply with the integration ban.

As further discussed below, grant of the requested waiver is necessary in order to permit Petitioner to continue to provide and expand the provision of advanced high-quality video and related digital services over its all-digital distribution network to subscribers located in rural communities. Unlike large MVPDs, such as Comcast or **Cox**: Petitioner is a very small provider that does not have the market power or resources to influence manufacturer timetables to develop conditional access solutions that comply with the FCC's integration ban. Petitioner has diligently made inquiries with its middleware provider to determine when an integration ban-compliant solution will be available; however, those providers have not committed to making compliant devices available before the effective date of the integration ban, which is July 1, 2007.<sup>4</sup>

## **II. DISCUSSION**

### **A. Standard for Waiver**

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<sup>3</sup> See. *Implementation of Section 304 of the Telecommunications Act of 1996; Commercial Availability of Navigation Devices*, 13 FCC Rcd 14775, 14808, ¶ 80 (1998); 47 C.F.R. § 76.1204(a)(1).

<sup>4</sup> *Implementation of Section 304 of the Telecommunications Act of 1996; Commercial Availability of Navigation Devices*, 20 FCC Rcd 6794, 6802-03 ¶ 13 (2005) ("2005 Deferral Order").

Beginning on July 1, 2007, pursuant to Section 76.1204(a)(1), Petitioner will be prohibited from using or leasing set-top boxes that perform both conditional access and other functions in a single integrated device. The purpose of this rule is to ensure common reliance by cable operators and consumer electronics manufacturers on the same conditional access mechanism. Specifically, the FCC stated in its 2005 *Deferral Order* that “the concept of common reliance is intended to assure that cable operator development and deployment of new products and services does not interfere with the functioning of consumer electronics equipment or the introduction of such equipment into the commercial market for navigation devices.”

Generally, the Commission’s rules may be waived only for good cause shown.<sup>6</sup> The FCC has consistently ruled that a waiver is appropriate only if the requested relief would not undermine the policy objective of the rule in question, special circumstances warrant a deviation from the general rule, and that such deviation will serve the public interest.<sup>7</sup> The policy objectives of Section 76.1204(a)(1) of the Commission’s rules would not be undermined because the market for the commercial availability of non-integrated devices will not be affected by granting a waiver to Petitioners. Furthermore, special circumstances exist here because a conditional access solution that provides for common reliance is not available to Petitioner. Absent a waiver, Petitioner would be required to cease providing video service to rural subscribers until an appropriate solution is available. The public interest would be served by granting a waiver to Petitioner to permit the company to continue to provide and expand advanced video service to rural subscribers in Iowa.

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<sup>5</sup> 2005 *Deferral Order* ¶ 30.

<sup>6</sup> 47 C.F.R. § 1.3.

<sup>7</sup> See generally, *WALT Radio v. FCC* 418 F.2d 1153 (D.C. Cir. 1969), cert. denied, 409 U.S. 1027 (1972); *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164 (D.C. Cir. 1990).

**B. The Policy Objectives of the Commission's Integration Ban Would not be Undermined by Grant of the Requested Waiver**

As noted above, the purpose of Section 76.1204(a)(1) is to ensure common reliance by cable operators and consumer electronics manufacturers on the same conditional access mechanism. Although the integration ban may confer a general benefit to consumers as a whole, the grant of a waiver to Petitioner, who is an operator of a small rural video system, would have negligible impact as Petitioner does not have any ability whatsoever to influence manufacturers to build devices that comply with the FCC's integration ban. Moreover, application of the rule to rural MVPDs, such as Petitioner, which serves sparsely populated and largely agricultural areas, would have an effect that Congress expressly directed the Commission to avoid. Specifically, in enacting the Telecommunications Act of 1996, Congress directed the FCC to implement regulations to encourage the deployment of advanced telecommunications capabilities to all Americans.\*

As further discussed below, Petitioner does not have any options available to provide set-top boxes to its customers that comply with the FCC's integration ban. Strict adherence to the letter of the rule would result in denying rural subscribers access to advanced all-digital video and related services, while allowing carriers that have not made the commitment to upgrade to new and more advanced technologies, such as the all-digital network employed by Petitioner, to continue to provide basic legacy cable services. Such an outcome would frustrate the intent of Congress to promote, rather than deny, advanced services to all Americans, particularly when

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<sup>8</sup> Telecommunications Act of 1996, Pub. L. No. 104-104, § 706, 110 Stat. 56, 153 (codified in notes under 47 U.S.C. § 157).

Congress also directed the Commission to “avoid actions which would have the effect of freezing or chilling the development of new technologies and services.”

**C. A Waiver is Necessary Because a Compliant Solution is not Available to Permit Petitioner to Continue to Provide All-Digital Service to its Customers After the Effective Date of the Integration Ban**

As discussed above, Petitioner utilizes a conditional access system that is provided by Nagravision. Although the Nagravision solution may comply with the integration ban requirement to provide security that is separable from the navigation device, at this time, Petitioner’s middleware provider has not confirmed this to be the case as some decryption or other function essential to the conditional access system may be integrated into the set-top box. Regardless of whether some necessary security function is incorporated into the set-top box, Petitioner believes that a waiver is necessary because the Nagravision solution as implemented by its middleware provider does not satisfy the common reliance requirement in the FCC’s rules.

The purpose of common reliance is to enable customers to purchase set-top boxes from retailers for use on any cable system. However, due to the proprietary nature of the Nagravision solution, the requirement for common reliance is not met. The Nagravision solution requires subscribers to use a smartcard provided by Nagravision that does not conform with the specifications for CableCARDS. Nagravision does not provide for common reliance because subscribers cannot purchase a CableCARD compatible device and use it with the Nagravision smartcard in order to access Petitioner’s video system. Rather, Petitioner’s subscribers must lease set-top boxes from Petitioner that are compatible with the Nagravision smartcard. Because the Nagravision smartcard system is proprietary, Petitioner relies on Nagravision to provide both the set-top box and the smartcards for its video system. This arrangement does not satisfy the

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<sup>9</sup> Joint Explanatory Statement of the Committee of Conference, S. Conf. Rep. 104-230, 104th Cong., 2d Sess. at 181 (1996).

Commission's requirement for common reliance as set-top boxes used in Petitioner's video system are generally not interoperable with other systems, and vice versa.

Petitioner is a very small MVPD providing video service to rural communities in Iowa. Given the insignificant size of its subscriber base when compared to those of the larger MVPDs, Petitioner does not have any ability to influence manufacturers or middleware providers to develop conditional access solutions that comply with the requirement for common reliance. Moreover, Petitioner does not have the resources or the expertise to develop such a solution on its own, and the company is completely dependent on outside providers for its set-top boxes and middleware. Accordingly, these special circumstances warrant waiver of the FCC's integration ban as no other viable solution is available to Petitioner that meets the Commission's requirement for common reliance.

**D. Grant of the Waiver is in the Public Interest Because it will Promote the Provision of Advanced All-Digital Video Television Service in Rural Areas**

In order to continue to provide service to its customers, all of whom are located in rural areas in Iowa, and to maintain the viability of its video system, Petitioner must use the set-top boxes and middleware provided by its current suppliers as there are no other alternatives in the marketplace to the conditional access solutions currently being used. After July 1, 2007, without the requested waiver, Petitioner would not be able to offer its subscribers the use of set-top boxes necessary to access even the basic features of its video system due to its all-digital transmissions, thereby disconnecting its customers from a primary source of news, entertainment, and advanced services available to video subscribers located in densely populated urban areas. Rural subscribers already have few, if any, choices for video programming and advanced services, and they may be located too distant from terrestrial television stations to receive reliable and good quality over-the-air transmissions. A waiver is necessary to permit subscribers to continue to



enjoy the benefits that Petitioner's advanced all-digital video service offers, and to allow Petitioner to continue to expand its service to subscribers that would not otherwise have access to high-quality video programming and services in rural areas.

### **III. CONCLUSION**

WHEREFORE, for the foregoing reasons, Petitioner requests that the Commission grant its Petition for Waiver of the integration ban set forth in Section 76.1204(a)(1) until December 31, 2009.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "James U. Troup", is written over a horizontal line.

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Counsel for Bernard Telephone Company Inc.

Date: April 5, 2007

### CERTIFICATION

I, Larry Bartels, hereby certify under penalty of perjury that I am authorized to make this certification on behalf of Bernard Telephone Company Inc. that I have read the foregoing document and know the contents thereof; and that the same are true of my own knowledge, except to those matters therein stated upon information and belief, and as to those matters I believe them to be true.

  
\_\_\_\_\_  
Larry Bartels  
General Manager  
Bernard Telephone Company Inc.

\_03/26/2007\_\_\_\_\_

\_\_\_\_\_  
Date